IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.799 of 2005

IN

NOTICE OF MOTION NO.1615 OF 2005

in

COUNTER CLAIM NO.2508 OF 2004

in

SUIT NO. 1330 OF 2000

Kanaylal M.Thakkar .. Appellant

versus

Shree Padmanabh Builders .. Respondents

...

Mr.V.A.Thorat, Senior Counsel i/b Mr.A.M.Gala for the Appellant.

Mr.T.N.Subramaniam i/b M/s.Puranand & Co for the Respondents

CORAM : R.M. LODHA AND

D.G. KARNIK, JJ

DATED : 5th December 2005.

P.C.:

1. Heard Mr.V.A. Thorat, the learned Senior Counsel for the appellant and Mr.T.N.Subramaniam, the learned counsel for the respondent.

2. Assailing the order dated 22nd July 2005, Mr.V.A. Thorat, the learned Senior Counsel for the appellant submitted that the learned Motion Judge misdirected in refusing to consider the Notice of Motion on merits and dismissing the same on the ground that there were no changed circumstances warranting modification of the order dated 12th February 2001.

3. The learned Senior counsel would submit that the learned Motion Judge ought to have adverted to the prima facie case.

4. The respondents herein are the original plaintiffs. They filed the suit for declaration that the defendant (appellant herein) has no right, title and interest in excess of 2455 sq.ft. FSI pursuant to the agreement dated 1st October 1989. Some incidental reliefs were prayed as well in the suit. The original

plaintiffs took out a Notice of Motion against the defendant for restraining them from making any further construction in the suit property and from transferring the said units beyond 2455 sq.ft. to third parties. In opposition to the said Notice of Motion, the defendant stated before the Court that the construction on 4th, 5th, and 6th floor of the building has been completed and the units have already been transferred to third parties. On behalf of the defendant, the statement was also made that no further construction shall be carried out. After the order came to be passed on 12th February 2001, the defendant filed counter claim seeking specific performance of the agreement dated 1st October 1989 and subsequent agreements and other reliefs. Thereafter, the defendant took out the Notice of Motion for permission to proceed with further construction in the suit property.

5. It is clear from the plaint as well as counter claim that the plaintiff and the defendant have basically founded their claim on the agreement dated 1st October 1989. There being serious dispute regarding the respective rights of the parties under the agreement dated 1st October 1989 and the said

rights shall be determined after the evidence is recorded, we find no justification to grant permission to the defendant to proceed with further construction. We find no fault in the consideration of the matter by the learned Motion Judge.

6. Besides that, further construction in the suit property if allowed to be made by the defendant may be seriously prejudicial to the interest of the plaintiff in the suit.

7. All in all, we are satisfied that the appellant (defendant) cannot be permitted to raise further construction in the suit property until disposal of the suit.

8. Appeal is accordingly dismissed in limine.

(R.M. LODHA, J)

(D.G. KARNIK, J)